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Via Email Only: Eileen.Sobeck@Waterboards.ca.gov

Eileen Sobeck, Executive Director
State Water Resource Control Board
1011 I Street
Sacramento, CA 95814

Re: Petition for Reconsideration of Order Conditionally Approving a Petition for Temporary Urgency Changes to License and Permit Terms and Conditions Requiring Compliance with Delta Water Quality Objectives in Response to Drought Conditions

On June 1, 2021, the State Water Resources Control Board (“SWRCB”) conditionally approved the above referenced Order. This Petition for Reconsideration of the SWRCB’s action is submitted on behalf of the South Delta Water Agency (“SDWA,”) Central Delta Water Agency (“CDWA”) and Rudy M. Mussi Investment LP, (collectively the “Delta Agencies”,) pursuant to Water Code section 1126 et seq. CDWA submitted a Protest Petition and comments on the proposed TUCP which is incorporated herein by reference. SDWA also submitted comments on the proposed TUCP which are incorporated herein by reference.

Petitioners’ Failure to Plan Does Not Result in an Urgent Need.

Consistent with the definition of “Urgent need” as defined by Water Code §1435 (c), the Department of Water Resources (“DWR”) and the U.S. Bureau of Reclamation (“BOR”) for the State Water Project and the Central Valley Project, collectively hereinafter referred to as the (“Projects”), were required to exercise due diligence in applying for a non-emergency change to their permits and diligently pursue that process. The Order makes no mention of this requirement or includes any findings to this effect. Since the last drought, Projects have failed to take any actions to amend their permits to address drought related circumstances including reduction of authorized exports. On the other hand, the analyses supporting D-1641 relaxations for dry and critical years considered and included extended drought periods and imposed reduced flow obligations in consideration of such conditions. Projects did not dispute these critical year requirements or later sought to have them modified.

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As the Order indicates, and as referenced in Comments to same, the drought year planning by DWR assumed sufficient precipitation would occur to allow for significant export operations in the first three to four months of 2021. The assumption was misplaced. Projects' failure to plan for dry and critical conditions has resulted in their failure to meet current water quality standards and compromised their ability to avoid future violations. Projects' "urgency" cannot be caused by their continued failure to plan and confront the reality that there simply is not enough water to satisfy export demands.

The TUCP Must Not Result in Injury to Other Legal Users.

Project operations affect nearly every water right holder in the Sacramento-San Joaquin watershed. Project reservoir operations generally determine how much water reaches the downstream rivers and the quality of same. The Project's obligations pursuant to statute and the terms of their permits, require they maintain the system and protect senior water rights before exporting from the Delta. In the absence of natural flow providing sufficient water quality, the Projects are obligated to operate their reservoirs to maintain a certain level of water quality. Because the Projects store water that would provide downstream benefits if it naturally continued downstream, the project releases in later times provides a physical solution which is to the benefit of all other legal users. When the SWRCB grants a TUCP that relaxes any such obligations to meet water quality standards it, necessarily, approves adverse impacts to other legal users.

Failure to plan for multi-year droughts results in water quality violations which adversely affects those dependent on and protected by water quality objectives. Failure to develop sufficient supplies to meet permit obligations while continuing to export water results in water quality violations which adversely affects those dependent on and protected by water quality objectives. Even after the previous drought, the Projects did not adjust their planning and operations to increase their ability to meet water quality objectives during dry years. Instead, the Projects sought to relax Delta outflow and relax the Western Delta Agricultural standard. Less outflow will affect the amount of ocean salinity intrusion which mixes and concentrates in certain Delta channels. Increased salt concentrations will likely adversely affect crop production. Crop production is adversely affected when seasonal soil salinity increases above certain thresholds (depending on the crop) or by a sudden jump in soil salinity. Neither the TUCP or the Order examine, much less recognize this issue and, thus, their conclusions about injury to other legal users are not supported by substantial evidence.

In addition, Water Code Section 12200 et. seq., as interpreted by the *Racanelli* decision, requires a sufficient supply to satisfy in Delta users, Delta water rights, and to repel salinity intrusion before the Projects can export from the Delta. The Order decreases salinity protection which will likely harm senior right holders in the Delta. The SWRCB also anticipates curtailing appropriative right holders in the Delta. In contravention of *Racanelli*, the Order authorizes such actions while allowing exports. Consequently, the Order adversely affect other legal users of water.

The TUCP Must Not Adversely Affect Fish and Wildlife.

Relaxing water quality objectives for fish and wildlife beneficial uses simply cannot be construed as “not having an unreasonable effect on fish and wildlife.” As the Order clearly states, the current water quality objectives are inadequate. A further relaxation of already inadequate standards must necessarily and unreasonably adversely affect fish and wildlife. The analysis in the Order refers to comments by NMFS, CDFW and FWS. Those comments are devoid of any endorsement of the Petition (FWS’ being a mere short memo of no scientific value). NMFS and CDFW’s comments clearly indicate that the proposed relaxation of the standards would worsen conditions for endangered and other fish species. These agencies note that the “saved water” in storage resulting from the changes “might” improve conditions for some species later, but ultimately conclude there is not enough information to determine if the Order will result in a benefit to fish and wildlife. Moreover, the Order is devoid of any scientific analysis to support the determination that potentially saving some water in a few reservoirs will be better than not. There is no analysis in the Order as to how (for example) “saving” 60 TAF of water in Shasta Reservoir will affect that reservoir’s cold water pool, when that cold water pool is the basis for the approval of the Order.

Hence, the Order’s conclusion that relaxing water quality obligations for fish and wildlife beneficial uses is unsupported by the evidence, any evidence.

The TUCP Fails to Address the Adverse Impacts from Water Transfers.

The TUCP fails to address the adverse impacts from transfers especially during dry and critically dry years. The Delta Agencies herein reiterate their formal position with regard to exports and transfers: That no export or transfer of water for export from the Delta Watershed be allowed unless all D-1641 requirements, without TUCPs are and will be met in both the current water year and future water years. Approval of any such exports or transfers should require adequate evaluation, monitoring and accounting of a) the actual timing and amount diverted and b) that such amount is truly surplus to the present and future needs within the Delta Watershed including the needs of fish and wildlife and the need to secure groundwater sustainability.

Due to a lack of development of sufficient supply, even under wet conditions, the water resources of our state are insufficient to meet the wants, needs, desires and allocations of all water users in our state. The storage of water while violating the terms and conditions of permits and licenses should not be recognized as entitlement and such water should not be allowed to be exported. The SWP and CVP did not develop sufficient surplus water to meet project obligations and contractor demand and the water needs within the watersheds of origin should not be deprived to facilitate the export of water whether it be claimed as stored water or transfer water or resulting from some change in place of use. The SWRCB’s recent administration of Water Code Section 1725 et seq. in furtherance of addressing that insufficiency represents a leak or loophole in the legal and regulatory framework designed to protect the vested rights of water users and public trust resources. As reliance on these temporary transfers has increased so has the volume and frequency

of water moved under Water Code Section 1725 et seq. While each transfer is analyzed in isolation, the cumulative and compounding impacts associated with temporary transfers are much broader. For these and the other reasons set forth herein, the CDWA urges the SWRCB to deny the transfer petitions before them.

Additionally, the transfer of water exacerbates the problems and impacts caused by increased concentrations of contaminated constituents in streams and critical habitat, especially under drought conditions when increasingly toxic saline return flows and accretions comprise a high portion of in-channel flow. Further, the Delta Agencies assert that the impacts to species and water quality caused by transfers in drought conditions cause more harm than the standard operation of the CVP and SWP in conformance with their standard (not changed or modified) conditions and constraints of their permits and biological obligations.

Both Water Code Section 11460et. seq. and Water Code Section 12200 et. seq., as referenced above, should prohibit the export of any water including transfer of water from the Sacramento-San Joaquin watershed which is not surplus to the present and future needs within the Delta and other areas of origin including fish and wildlife needs and compliance with the unchanged D-1641. In light of the TUCP petition, it would appear that BOR and DWR are unable to meet water quality obligations within the Sacramento-San Joaquin watershed. This water is clearly needed in the area in which it originates. In lieu of permitting transfer or export of water the SWRCB should require BOR or DWR to purchase through recapture of exported water enough supply to meet their obligations in the watershed. To reiterate: no export or transfer of water for export should be permitted unless D-1641 requirements, without the TUCP, are (current year) and will be met (future years).

The TUCP Is Not in the Public Interest

For the reasons set forth herein, and in the comments submitted by the Delta Agencies and others, the TUCP is not in the public interest. In contrast, the TUCP condones Petitioners' continued failure to seriously plan for dry years and refusal to embrace the fact there is not enough water in the system for export demands. The SWRCB's further endorsement of such omissions will inevitably result in a similar circumstance in the future. Additionally, the TUCP will result in injury to other lawful users and there is no substantial evidence to support a determination that implementation of the TUCP will benefit fish and wildlife. Therefore, the TUCP is contrary to the public interest.

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Conclusion

The TUCP should be denied or amended to address the issues set forth above and, in the comments, and protests submitted by the Delta Agencies and others.

Very Truly Yours,

MOHAN, HARRIS RUIZ, LLP



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SDR/tag

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